

Statement for the Record

Submitted by Eagle Forum Education & Legal Defense Fund

Hearing of
The U.S. House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

“The Patent Trial and Appeal Board After 10 Years:
Impact on Innovation and Small Businesses”

June 23, 2022

Mr. Chairman, Mr. Ranking Member, and subcommittee:

Thank you, Chairman Johnson, for convening this hearing and for its focus on PTAB’s harmful effects on innovation and small business.

During debates leading to the Smith-Leahy America Invents Act, Eagle Forum Education & Legal Defense Fund founder Phyllis Schlafly¹ noted: “Foreign countries are free to copy our [patent] system. Instead they want to copy our inventions.” Advocates of the AIA and its legislative precursors claimed their goal was “harmonization” of patent systems. “She would write that all such efforts were aimed at making the U.S. system more inferior (as it sought to make the U.S. system more like other countries’ systems around the world). She was clear that she would not object to efforts aimed at the ‘harmonization’ of the rest of the world to make their patent systems more like the superior U.S. one.”²

AIA advocates hailed their bill, which included the Patent Trial and Appeal Board and its adversarial administrative proceedings, as “patent reform.” Mrs. Schlafly cautioned that it contained “no reform at all.”³ Ten years hence, we know she was right. Rather than “reform,” the AIA and PTAB assaulted private property rights, due process, and keys to U.S. success. Among the hardest hit by the AIA and PTAB are small businesses, independent inventors, and entrepreneurs trying to commercialize patented inventions.

PTAB has destabilized American patent rights. PTAB has unhinged predictability, certainty, and fairness for U.S. patents and inventors. PTAB proceedings gut the constitutionally guaranteed private property right of exclusivity to one’s inventions for a limited time. PTAB, as Mrs. Schlafly put it, “subjects [inventors] to expensive new litigation and retroactively attacks” patents.⁴

AIA proponents claimed that PTAB would weed out “bad” or “weak” patents. It would provide a faster, cheaper alternative to court litigation. Instead, PTAB has a wide-open door to anyone who wants to challenge a patent’s validity, even on flimsy grounds. The likelihood of repeated challenges before PTAB panels, a weapon of challengers’ “lawfare”—waging litigation in both federal court and PTAB simultaneously and sequentially—means no issued patent ever has quiet title. No patent owner can expect or rely on the right of exclusivity for the patent term.

¹ <https://www.ipwatchdog.com/2017/05/19/phyllis-schlaflys-devotion-patents-inventors/id=83375/>

² <https://www.ipwatchdog.com/2018/05/23/invention-patents-phyllis-schlaflys-legacy/id=97574/>.

³ Ibid.

⁴ https://pseagles.com/Patent_Act_Is_Dangerous_to_U.S._Security

Nor does PTAB in any fashion result in a speedy patent validity determination—at least not one that could be considered final and dispositive for the remainder of the patent term. It does not reduce patent owners’ legal costs associated with their patents, but rather it increases overall expenditures exponentially. And PTAB is certainly not an alternative to federal district court; it is yet another forum in which patent owners must defend their patents against (often the same basic) validity challenges in multiple venues of litigation. Rather, PTAB has proven itself to be little more than another brick in the wall of the constitutionally suspect Administrative State.⁵

As Mrs. Schlafly warned her bipartisan allies and fair-minded hearers, PTAB poses a tremendous threat to U.S. national security and industrial competitiveness. During the AIA debate, she quoted a Chinese official in an op-ed regarding the legislation. The Chinese official described the ramifications of the Leahy precursor to the AIA: “Yongshun Cheng, former senior judge and deputy director of the Intellectual Property Division of Beijing High People’s Court, stated bluntly that the proposed U.S. patent bill is bad news for American innovation and good news for foreign infringers. He pointed out that the bill ‘is friendlier to the infringers than to the patentees in general as it will make the patent less reliable, easier to be challenged, and cheaper to be infringed.’”⁶

Unfortunately for America’s inventors, patent owners, patent commercializers, investors, and members of society who would benefit from the new jobs, new products, and new wealth patents create, a Chinese rival spoke more accurately and truthfully about PTAB’s effects. Meanwhile, some U.S. politicians and their patent-infringing allies dissembled about the AIA and missed by a mile with their prognostications. The Chinese official’s estimation should have been a flashing red light and siren to American lawmakers. Instead, Big Tech, China’s national champions, and predatory patent infringers have been the sole beneficiaries and are the most active challengers at PTAB.⁷ PTAB is increasingly a tool for abuse.⁸ The biggest problem for our nation and our future as a global innovation leader in emerging technologies, not to mention for our economic strength, is that the dissemblers continue to use the same false narrative about “weak” patents and downplay PTAB’s destructive role in patent reexamination and litigation.⁹

Eagle Forum ELDF considered the reasonable, modest administrative reforms at PTO and to PTAB made by former Patent and Trademark Office Director Andrei Iancu to be constructive and to provide a modicum of balance.¹⁰ Yet, even modest mitigation of PTAB’s excessive bias toward petitioners, particularly discretionary denial of PTAB petitions under consideration of *Fintiv* doctrine when other proceedings weigh the same patents’ validity in other forums, proves too inconvenient to Big Tech and other members of the Infringers Lobby.

⁵ <https://usinventor.org/wp-content/uploads/Maladministrative-State-Transcript.pdf>

⁶ https://pseagles.com/Patent_Reform_Is_A_Patent_Giveaway

⁷ <https://innovationalliance.net/from-the-alliance/infographic-big-tech-companies-are-biggest-users-of-ptab/>

⁸ E.G., *OpenSky Industries v. VLSI Technologies*, IPR2021-01064

⁹ <https://www.ipwatchdog.com/2021/07/29/closer-evidence-based-look-patent-quality-advocacy/id=136160/>

¹⁰ See, for example, <https://www.uspto.gov/sites/default/files/documents/11172020EagleForumEducationandLegalDefenseFund.pdf> and <https://www.uspto.gov/sites/default/files/documents/06-19-20%20Eagle%20Forum%20Education%20%26%20Legal%20Defense%20Fund.pdf>

Disturbingly, the proposals contained in the PTAB Reform Act seems to show that PTAB cannot lean far enough against inventors and patent owners, in the eyes of the Infringers Lobby's champions. The Alliance of U.S. Startups and Inventors for Jobs, comprised of bonafide high-tech inventors and entrepreneurs, says the PTAB Reform Act "is disastrous" for its class of innovators. USIJ notes that "every patent that poses a competitive risk to Big Tech and that is being litigated or considered by the ITC [U.S. International Trade Commission], *or has already been found valid and infringed*, is guaranteed an IPR [inter partes review]."¹¹ (emphasis in original)

Moreover, these proposals would essentially harden an administrative body's ability to overrule Article III courts' rulings on the same patents—something the Founders who wrote the judicial branch into the Constitution and separated powers among the branches would likely decry. The undoing of *Fintiv* doctrine and of estoppel, for instance, would ensure that patents may be targeted throughout their terms, despite what a federal court or the ITC may have determined through far more robust due process and procedural fairness. The only commendable proposal would codify the *Phillips* standard of patent claim construction. Otherwise, like the proposed policies of the Restoring the America Invents Act, the effect of the PTAB Reform Act's proposals would be to crush America's true innovators and reward China and Chinese competitors vying for global leadership in "frontier" technologies.¹²

In conclusion, PTAB remains a powerful weapon—for canceling issued patents, empowering patent infringers, destroying exclusive private property rights, and aiding and abetting foreign competitors and adversaries in their quest to overcome U.S. leadership in cutting-edge technologies and industries.

We commend Chairman Johnson for taking a close look at PTAB's effects on American inventors and the U.S. national interest. Judging by this hearing, at least some lawmakers recognize that PTAB tilts the playing field against inventors, startups, and entrepreneurs that rely on patents and patent exclusivity.

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¹¹ https://twitter.com/USIJorg/status/1537936023618916352?s=20&t=FGB9zCm8OOwmCpJFGP_EQ

¹² <https://townhall.com/columnists/jamesedwards/2022/04/26/raias-gift-to-big-tech-and-china-n2606334>